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FILED
OCT 26 1904
JAMES H. MCKENNEY,
Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

NUMBER 59.

THE MERCANTILE TRUST AND DEPOSIT COMPANY OF BALTIMORE,

Appellant.

v.

THE CITY OF COLUMBUS, ET AL.,

Appellees.

Appeal from the Circuit Court of the United States for the Northern District of Georgia.

BRIEF IN BEHALF OF APPELLEES.

ELLIS, WIMBISH & ELLIS,
J. H. MARTIN,
T. T. MILLER,
Solicitors for Appellees.

(19,805)

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Appellant.

v.

THE CITY OF COLUMBUS, ET AL.,

Appellees.

Appeal from the Circuit Court of the United States for the Northern District of Georgia.

BRIEF IN BEHALF OF APPELLEES.

STATEMENT.

It is deemed appropriate to submit a brief statement of what we conceive to be the material facts relating to the jurisdiction of the Circuit Court.

On October 7th, 1881, a contract was entered into between the City of Columbus and one Thomas R. White for the construction and operation of a system of waterworks for the purpose of supplying the City and its inhabitants with water for domestic and sanitary purposes and for fire protection. This contract provided among other things:

That the source of water supply should be selected by White, he guaranteeing, however, that the supply of water both in quality and quantity should be wholesome, constant, and amply sufficient to meet both present and future requirements of the City and private consumers.

Transcript page 35, Sec. X.

That the Mayor and Council of the City should grant a franchise for the exclusive privilege of maintaining and operating the works for a period of thirty years, or until such time as the works might be purchased by the City; and that during such time the City would rent and pay for at a stated price a specified number of fire hydrants.

Transcript page 36, Sec. XIV.

Thomas R. White and his associates organized the Co-

lumbus Waterworks Company under the general laws of the State of Georgia, to which company was assigned the contract with the City of Columbus.

Transcript page 2, Sec. IV.

It is not contended by the appellant that in entering into this contract the City had any express legislative authority, or the sanction of a popular vote. In so contracting the City proceeded in the exercise of its police power, pursuant to the general welfare clause usual in municipal charters. The contract was signed on the part of the City by the Mayor and four other persons whose official capacity does not appear.

Transcript page 44.

In order to secure an issue of $500,000 of bonds, the Columbus Waterworks Company on January 1st, 1891, executed a mortgage to the Mercantile Trust and Deposit Company of Baltimore as Trustee (the appellant here,) creating a lien upon the property and assets of the Waterworks Company, including its franchises and the benefit of its contract with the City of Columbus.

Transcript page 16; pp. 20-22.

Of the bonds so secured $400,000 in amount were issued and disposed of.

Transcript page 2, Sec. II.

On September 14th, 1902, the Mayor and Council of the City of Columbus adopted an ordinance submitting to the qualified voters of the City at an election ordered to be held on December 4th, 1902, the question whether the City should issue $250,000 of negotiable bonds, the proceeds to be used in constructing, maintaining and operating a municipal system of waterworks. In the preamble to this ordinance it was declared that the Columbus Waterworks Company had "totally failed to supply the City of Columbus and its inhabitants with a sufficient quantity of pure and wholesome water;" and it was also declared that the public health was paramount in importance to every other consideration.

Transcript page 46.

The ordinance is otherwise silent respecting the Columbus Waterworks Company, or its contract with the City. There is no repudiation of the contract, nor is any right, privilege or franchise of the Waterworks Company withdrawn or revoked. The ordinance simply

asserts the right of the City to provide its own water supply because the Waterworks Company had failed in its duty in this regard.

The election ordered was held on December 4th, 1902, and the result was declared to be in favor of the issuance of the bonds.

Transcript page 8.

On May 6th, 1903, the Mayor and Council adopted a resolution directing that bids for the purchase of the bonds be invited, the bids to be opened on August 1st, 1903.

Transcript page 50.

Pending the receipt of such bids the original bill in this case was filed on July 30th, 1903.

Other than as herein stated the bill alleges no act on the part of the City which is claimed to be in derogation of the contract.

The General Assembly of the State of Georgia passed an Act, approved December 4th, 1902, authorizing the City of Columbus to construct, maintain, own and operate a system of waterworks, and providing the machin-

ery requisite for the full execution of the purpose in view.

Acts of 1902, page 370.

This Act contains no reference, direct or remote, to either the Columbus Waterworks Company or its contract with the City.

It is not claimed in behalf of the appellant that the City has taken any step in the pursuance of this Act, or of the authority therein contained, that would impair the obligation of its contract with the Waterworks Company; nor is it claimed that the City invokes this Act as releasing it from any obligation. The acts of the City complained of are precedent to and independent of this legislation.

The original bill was filed by the appellant, The Mercantile and Deposit Company, of Baltimore, Md., as Trustee for the holders of the mortgage bonds of the Waterworks Company, against the City of Columbus, a municipal corporation of the State of Georgia, against the Mayor and Aldermen of said city in their official capacity, and against the Columbus Waterworks Company, a corporation and citizen of the State of Georgia. The right

to maintain the suit proceeds upon the theory that the conduct of the city is such as to impair the obligation of its contract with the Waterworks Company; and that the benefit of said contract having been pledged as security for the bonds, the plaintiff (appellant) as Trustee for the bond-holders may in their interest enforce the said contract and protect its obligation from impairment. It is not claimed that any contractual relation existed between the Trust Company and the City. Whatever rights the Trust Company may have as against the City are derived from and depend upon the trust mortgage executed by the Waterworks Company to secure the issue of its bonds. The City is no party to this mortgage.

The bill alleges that the contract in question conferred upon the Waterworks Company the exclusive privilege of maintaining and operating waterworks in the City during the life of the contract.

Transcript page 7, Sec. XVI.

It is not averred that in granting an exclusive privilege the City acted under even color of legislative authority.

It is averred that the ordinance of September 14th, 1902, the election held in pursuance thereof, and the

resolution inviting bids for the purchase of the bonds, amount to a repudiation of the contract by the City and a disavowal of any liability thereunder.

Transcript pages 8-9.

It is claimed that such conduct on the part of the City is an "attempt" to violate the obligation of the contract under "color" of authority of law.

Transcript page 12.

It is, nevertheless, averred that the contract "is still in force and is a valid and binding contract."

Transcript page 8.

It is also alleged that the City "unlawfully" refuses to pay an installment of water rental claimed to be due.

Transcript page 10, Sec. XXI

It does not appear when this refusal to pay occurred, or upon what ground it was sought to be justified. It

is not alleged that at the time of the filing of the bill the City was not taking and paying for water under the contract.

The bill avers that not only had the Waterworks Company done all in its power to comply with the contract, but it had in fact fulfilled and performed all of the obligations resting upon it under the contract.

Transcript page 6.

The bill, however, shows that on December 22nd, 1902, the appellant here, as Trustee for the holders of the bonds of the Waterworks Company, filed a bill in the Circuit Court for the foreclosure of the mortgage and for a receiver in aid thereof. The receiver was appointed, and under authority of the court issued $50,000 in receiver's certificates, devoting the proceeds to the improvement of the water system, in order that an adequate supply of wholesome water might be furnished.

Transcript page 10, Sec. XX.

At the time this foreclosure bill was filed there had been no default in the payment of interest on the bonds. The default alleged was the failure on the part of the

Waterworks Company to observe its convenant to so maintain its system as to enable it to provide an adequate supply of water to the City of Columbus and its inhabitants. It was in said bill averred upon information, that for more than six month preceding the Waterworks Company had suffered the security of the bondholders to become impaired by not keeping its system supplied with all of the machinery, equipment and appliances for providing water to the City of Columbus and vicinity, and by not making useful and proper additions, betterments and improvements to its waterworks.

Transcript page 66.

It is indicated that the default on the part of the Waterworks Company was directly caused by a failure in its source of water supply; and it is stated that owing to the attitude of the City of Columbus in taking steps to provide a water system of its own, the Waterworks Company could not sell its bonds to raise money and was therefore unable to provide an adequate source of supply.

Transcript page 66.

To the original bill the City demurred on the grounds, among others, as follows:

That the City was without power to grant an exclusive privilege;

That the requisite diversity of citizenship did not exist to confer jurisdiction on the Circuit Court, after an alignment of the parties according to interest;

That no federal question was presented.

Transcript pages 53, 54, 77-78.

On October 19th, 1903, the plaintiff (appellant) filed an amended bill praying an order of the Court authorizing the issuance of receivers' certificates in an amount which would, in the opinion of the Court, be adequate to furnish the City and its citizens with a sufficient supply of wholesome water, in accordance with the terms and requirements of the contract in question. The belief was expressed that any failure on the part of the Waterworks Company to comply with the requirements of the contract was due in large part if not entirely to the conduct of the City of Columbus.

Transcript pages 56, 57.

The demurrer of the City was renewed to the bill as amended.

Transcript pages 57, 58.

After hearing argument of counsel, the Court overruled these demurrers.

Transcript page 65.

The cause was in due course referred to the master, who took evidence, heard argument, and filed his report. While the cause was pending in the Circuit Court on exceptions to the Master's report, and after argument thereon, counsel for the City of Columbus filed a motion to dismiss the bill as amended for want of jurisdiction on the following grounds:

First. Because there is no such diversity of citizenship as is requisite to sustain the jurisdiction of the court, for that the Columbus Waterworks Company while nominally a defendant should be aligned with the plaintiff according to interest, and the said Waterworks Company is a corporation and citizen of the same State as this defendant.

Second. Because there is no federal question involved on which the jurisdiction of the court can be sustained independently of diversity of citizenship, for that the action of the city in proceeding to issue bonds for the construction of its own system of waterworks constituted at most a breach of the contract not equivalent to legislation affecting or impairing the obligation of the

contract between the city and the Columbus Waterworks Company as assignee of Thomas R. White, in contravention of the Constitution and laws of the United States.

Transcript page 78.

After argument of counsel thereon, the motion to dismiss was sustained.

Transcript page 72.

The cause is before this court on the question of jurisdiction only, upon the certificte of the presiding judge, in conformity with Section 5 of the Act of March 3rd, 1891.

ARGUMENT.

NO DIVERSITY OF CITIZENSHIP.

The diversity of citizenship requisite to confer jurisdiction does not exist.

The appellant predicates its right to maintain this suit upon its relation as Trustee for the bondholders of the mortgage bonds of the Waterworks Company. No direct contractual relation with the City is claimed. Whatever rights the appellant may have as against the City are derived from and come through the Waterworks Company. There is no controversy between them respecting the duties and obligations arising under the contract forming the subject of the suit. It is admitted that the Waterworks Company is an indispensable party, but no substantial relief is prayed against it, nor could any such relief be granted in view of the allegation that the Waterworks Company had done all in its power to preserve and carry out its contract with the City. It is obvious that when aligned acording to interest the Waterworks Company stands on the side of the appellant. There is apparent a friendly arrange-

ment devised for the purpose of conferring jurisdiction upon the United States Court.

The Waterworks Company, being a corporation and citizen of the same state as the City of Columbus and the other defendants named, the jurisdictional diversity of citizenship is lacking.

Upon this point the recent case of Dawson v. Columbia Avenue Trust Co., 197 U. S. 178, 49 L. Ed. 713, is deemed to be conclusive.

American Waterworks & Guarantee Co. v. Home Waterworks Co., 115 Fed. 171. (C. C. A.)

New York Guarantee & Indemnity Co. v. Memphis Water Co., 107 U. S. 205, 27 L. Ed. 484.

Eau Claire v. Payson, 107 Fed. 552; 109 Fed. 676. (C. C. A.)

NO FEDERAL QUESTION.

I.

The bill alleges a valid, subsisting contract on the part of the City granting to the Waterworks Company the exclusive privilege of maintaining and operating waterworks in said City for a period of thirty years from October 7th, 1881; and binding the City during that time

to rent and pay for fire hydrants as specified in the contract.

Transcript page 7.

It is alleged that the City on September 14th, 1902, adopted an ordinance ordering an election to be held on December 4th following, to determine whether the City should issue $250,000.00 of bonds, the proceeds to be applied in the construction of a municipal system of waterworks. It is further alleged that the result of said election was declared to be in favor of the issuance of the bonds, and that on May 6th, 1903, the Mayor and City Council directed that bids for the purchase of the bonds be invited.

From these facts the conclusion is drawn that the City repudiated its contract and disavowed its liability thereunder.

Transcript pages 8-9.

This conclusion is unwarranted. In none of the ordinances is the contract in question mentioned. There is not one fact averred upon which to found the allegation that the City had repudiated its contract. Only once is the Columbus Waterworks Company referred to.

and that is in the preamble to the ordinance of September 14th, 1902, ordering the bond election, wherein the following language occurs:

"WHEREAS, The Columbus Waterworks Company has totally failed to supply the City of Columbus and its inhabitants with a sufficient quantity of pure and wholesome water; and WHEREAS, the public health of the City of Columbus is paramount in importance to every other consideration," etc.

Transcript page 46.

There is no allegation that at the time the bill was filed the City was not taking and paying for water as provided in the contract. The logical inference is that the City had determined it to be necessary to construct and operate its own system because the Waterworks Company had totally failed to perform its contract obligation to furnish an adequate supply of wholesome water. This is supported—indeed rendered certain—by the averments contained in the bill filed on December 23rd, 1902, by the appellant as Trustee for the bondholders against the Waterworks Company for foreclosure of the trust mortgage. There was no default in the payment of interest on the bonds at that time, and the bill proceeded upon the theory that the Water Company

having failed to observe the requirements of its contract with the City the security of the bondholders was endangered. In that bill it is alleged upon information "that for more than six months past the Columbus Waterworks Company has suffered the security of the bondholders to become impaired by not maintaining and keeping its waterworks supplied with all the machinery, equipment and appliances for providing water for the City of Columbus and vicinity, and by not making useful and proper additions, betterments and improvements to said waterworks."

Transcript page 66.

No denial of this averment appears in the record and it must be taken to be true. It is fair to conclude then that the City had not disclaimed any of its obligations under the contract, but was in good faith proceeding in discharge of its municipal trust to remedy the default of the Water Company by supplying the quantity and quality of water necessary to preserve the health and protect the property of its inhabitants. If this contention tect the property of its inhabitants. If this contention was well founded it was both the right and duty of the City to follow the course adopted. If the City was bound under its contract not to erect a rival system under the conditions as they existed, its action would simply be a breach of the contract for which the local law afforded ample redress.

It is plain that the dispute was whether the Waterworks Company had so failed in the discharge of its duty under the contract as to justify the City in proceeding to construct a municipal system. This controversy presents no semblance of a federal question. The construction of the contract, as well as the rights and duties of the parties arising thereunder, depend wholly upon the law of the State of Georgia. If the City was right in its contention its action would be justifiable; if wrong, it would be legally liable for its violation of its contract.

II.

Should the acts of the City be construed to be the equivalent of a repudiation of the contract, this would not give rise to any federal question.

A denial of liability under a contract does not affect its obligation. The inherent difference between a contract and its obligation has been repeatedly recognized by this Court, which has declared that the word "obligation" occurring in the contract clause of the Constitution was used advisedly. Parties make contracts; the law creates the obligation.

Mr. Chief Justice Marshall thus pointed out the dis-

tinction in Sturges v. Crowninshield, 4 Wheat. 122, 4 L. Ed. 529:

> "A contract is an agreement in which a party undertakes to do or not to do a particular thing. The law binds him to perform his undertaking, and this, of course, is the obligation of his contract."

The obligation of the contract is the "chain of the law" giving legal efficacy to the undertaking.

Ogden v. Saunders, 12 Wheat. 213, 9 L. Ed. 642.

Since the law creates the obligation, only the law can impair or destroy it. It can not be affected by any act or default of either contracting party. The Constitutional provision is intended to protect the obligation of contracts against impairment by the laws of a state. The subsequent law must have the effect of loosening the chain of the obligation by changing the rights or the essential remedies of the parties as they existed when the contract was entered into.

Ogden v. Saunders, 12 Wheat. 214, 327; 9 L. Ed, 642.
Bronson v. Kinzie, 1 How. 312; 11 L. Ed. 143.
McCracken v. Haywood, 2 How. 608; 11 L. Ed.397.
Edwards v. Kearzey, 96 U. S. 595; 24 L. Ed. 793.

A municipal ordinance, if authorized by the legislature, may have the force and effect of a law of the state; and if obnoxious to the Constitution, be held to impair the obligation of a contract. The ordinance must have been passed in pursuance of state legislation passed subsequent to the contract.

McCracken v. Haywood, 2 How. 608; 11 L. Ed. 397.

Lehigh Water Co. v. Easton, 121 U. S. 392; 30 L. Ed. 1059.

The mere fact, however, that a party repudiating a contract is a municipal corporation, does not give to its refusal to perform the character of a law impairing the obligation of the contract, or constitute the taking of private property without due process of law.

Dawson v. Columbia Ave. Trust Co., 197 U. S. 178; 49 L. Ed. 713.

St. Paul Gas Light Co. v. St. Paul, 181 U. S. 142; 45 L. Ed. 788.

Hamilton Gas Co. v. Hamilton, 146 U. S. 258; 36 L. Ed. 1059.

In pursuing the course adopted, the City of Columbus acted without legislative sanction. No law of the State

had been passed subsequent to the contract which in the slightest degree altered the rights or remedies of either party. If the City was, under the contract when made, bound not to construct a rival system of waterworks, it was still so bound unless relieved by the default of the Waterworks Company. If no such obligation existed, or if the City was without power to so contract, the conduct of the City offended no principle of law or morals. The right of the City to provide its own water supply was the same as when the contract was entered into unless the City was lawfully restrained by the contract itself.

The City contracted (1) that "The Mayor and Council are to grant a franchise for the exclusive privilege of maintaining and operating the works for a period of thirty (30) years, or until such time as they may be purchased by the City;" and (2) that during such time it would rent and pay for a specified number of fire hydrants.

Transcript page 36, Sec. XIV.

Whether the contract granted an exclusive privilege such as to prevent the City from constructing its own system, and if so whether the City had power to grant such an exclusive right, are questions to be determined by the laws of the State, in no wise involving the con-

struction or application of the Constitution of the United States.

Fergus Falls v. Fergus Falls Water Co., 72 Fed. 873.

If the City in fact granted such exclusive privilege and if in law it had power so to do, none of the alleged acts on the part of the City have in the least impaired the obligation of the contract. All of the rights and remedies of the Waterworks Company existing when the contract was made remain undisturbed and legally enforceable.

The refusal of the City to pay an installment of water rental claimed to be due is alleged to have been "unlawful," (Trans. p. 10) and is so plainly a mere breach of the contract as not to require argument.

Ratton Water Co. v. Ratton, 174 U. S. 360; 43 L. Ed. 1005.

St. Paul Gas Light Co. v. St. Paul, 181 U. S. 142; 45 L. Ed. 788.

In the case of Dawson v. Columbia Avenue Trust Co., 197 U. S. 178; 49 L. Ed. 713, the City of Dawson entered

into a contract by its terms granting an exclusive franchise, in pursuance of the same general authority of law as did the City of Columbus in the present case. In Georgia, a city in the exercise of its police power and in order to promote the general welfare may contract for or itself provide a supply of water for domestic use and fire protection.

Frederick v. Augusta, 5 Ga. 561.
Rome v. Cabott, 28 Ga. 50
Wells v. Atlanta, 43 Ga. 67.
Dawson v. Dawson Waterworks Co., 106 Ga. 709.

The City of Dawson formally and specifically repudiated its contract on the ground that the City was without power to grant an exclusive franchise, and on the ground that the contract for payment of future rentals created an indebtedness prohibited by the Constitution of the State. The City thereafter refused to pay even for water used for fire protection. As in the instant case, a popular election was ordered and held to determine whether bonds should be issued to provide a municipal water system. The result was declared to be in favor of bonds, and the City was proceeding to issue and market the bonds for this purpose.

The Court declared that the repudiation of a contract by a municipal corporation without legislative authori-

ty did not amount to the violation of the obligation of a contract, and continued:

"We repeat that something more than a mere refusal of a municipal corporation to perform its contract is necessary to make a law impairing the obligation of contracts or otherwise to give rise to a suit under the Constitution of the United States."

The case at bar can not be distinguished from the Dawson case, unless the Act of December 3rd, 1902, creates a substantial difference.

III.

The Act of the General Assembly of Georgia approved December 3rd, 1902, was not intended to nor did it affect the contract between the City and the Waterworks Company.

This Act gave no authority to the City to avoid any of its contracual obligations. It did not even create the right to build a municipal system of waterworks. As has been shown that right was already vested in the City. This Act merely defined the right and conferred other incidental powers designed to aid in the more perfect accomplishment of the end in view. There is noth-

ing in the Act which would authorize the City to do anything in derogation of its contract with the Waterworks Company. Neither the Waterworks Company nor its contract with the City was mentioned or even remotely referred to. The Act would not be employed to coerce or induce the Waterworks Company to part with its property or any of its rights. It simply authorized the City to adopt certain methods and employ certain machinery for the more complete exercise of an undoubted power. The rights, remedies, duties and obligations of neither party to the contract were in the slightest degree varied. Not one single act on the part of the City is pointed out as having been taken in pursuance of or under color of authority of this state legislation. It is not claimed, nor could it be, that the City vouches this law as a justification for any of the acts which are alleged to be in derogation of the contract.

The acts of the City which are alleged to constitute an "attempt" to violate the obligation of the contract are stated to be:

1. The ordinance of September 14th, 1902, declaring the default of the Waterworks Company and submitting to the qualified voters of the City the question whether bonds should be issued for the purpose of constructing a municipal waterworks system.

2. The declaring of the result of the election as being in favor of the issuance of the bonds.

3. The resolution of May 6th, 1903, inviting bids for the purchase of the bonds.

The ordinance submitting the question of the issuance of bonds to the qualified voters of the City and ordering an election thereon was adopted nearly three months before the Act of the Legislature was passed. The ordinance was enacted by the City in the exercise of its police power, subject to which the contract was entered into, and was predicated upon the default of the Waterworks Company. The election held was pursuant to this ordinance, deriving neither authority nor validity from the Act of the Legislature. The resolution inviting bids for the purchase of the bonds was subordinate to and strictly in pursuance of the preceding ordinance and election. These subsequent acts depended wholly upon the ordinance of September 14th, 1902, and are entirely independent of the Act of the Legislature mentioned.

If the City was not justified in these several related acts by conditions existing on September 14th, 1902, nothing in the Act of December 3rd, 1902, can vitalize or sanction them.

This Act can not be construed as a ratification by the State of any previous action on the part of the City which would otherwise be illegal. As has been shown the City already possessed the power to build waterworks. Its right to issue bonds for this purpose was not

derived from the Act, but was founded upon laws in existence when the contract was made. If it was forbidden by its contract from taking the action the City could claim no immunity by anything contained in this Act of the Legislature. It was only authorized to proceed lawfully in the execution of its purpose, not in contravention of law by a disregard of any valid contract obligation.

The case at bar is clearly distinguishable from the actAl under subsequent legislation manifestly directed acted under subsequent legislation manifestly directed against the contract in the particular case.

In the Vicksburg case (185 U. S. 65; 46 L. Ed. 808) the contract was entered into under legislative authority and its repudiation was expressly sanctioned by a subsequent act putting an arbitrary valuation upon the property of the Water Company.

In the Knoxville case (No. 123, decided January 2, 1906) the City acted in direct pursuance of legislation authorizing it to purchase the property of the Water Works and in default thereof to construct a rival system.

IV.

The Court will look beyond the allegations of the bill to the facts properly pleaded in order to determine whether a real and substantial federal question is presented.

Millingar v. Hartupee, 6 Wall. 258, 18 L. Ed. 829.

Wilson v. North Carolina, 169 U. S. 586, 595, 18 Sup. Crt. 435, 42 L. Ed. 865.

McCain v. Des Moines, 174 U. S. 168, 181, 19 Sup. Crt. 644, 43 L. Ed. 936.

New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 344, 22 Sup. Crt. 691, 46 L. Ed. 936.
Sawyer v. Piper, 189 U. S. 154, 23 Sup. Crt. 633, 47 L. Ed. 757.
Newburyport Waterworks Co. v. Newburyport, 193 U. S. 561, 576; 24 Sup. Crt. 553; 48 L. Ed. 795.
Harris v. Rosenberger, 145 Fed. 449. (C. C. A.)

In the Newburyport case (supra) it was said:

"If jurisdiction is to be determined by the mere fact that the bill alleged constitutional questions, there was, of course, jurisdiction. But that is not the sole criterion. On the contrary, it is settled that jurisdiction does not arise simply because an averment is made as to the existence of a constitutional question, if it plainly appears that such averment is not real and substantial but is without color of merit."

In the case at bar the Court will look to the facts properly pleaded and also to the contract attached as an exhibit to the original bill to see if any valid grant of an exclusive privilege has been made. As was said by Judge Caldwell in Fergus v. Fergus Falls Water Co., 72 Fed. 876: "If there was no contract there was no obligation to be impaired. If there was a valid contract its obligation is not questioned."

It is not open to question in this Court that in the absence of express legislative authority a municipal corporation can not grant an irrevocable, exclusive privilege so as to create a monopoly.

Mr. Justice Nelson in Minturn v. La Rue, 23 How. 453, 16 L. Ed. 574, states the principle as follows:

"It is a well setttled rule of construction of grants by the legislature to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the Act or derived therefrom by necessary implication, regard being had to the objects of the grant. Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public. This principle has been so often applied in the construction of corporate powers, that we need not stop to refer to authorities."

In Wright v. Nagle, 101 U. S. 791, 25 L. Ed. 921, it is held that exclusive rights to franchises are not favored and will never be presumed. In that case it appeared that the statutes of Georgia authorized the inferior courts to confer franchises for the establishment of ferries and bridges, but the court said that such a power did not confer the right to tie the hands of the public with respect to its future necessities.

The Court, speaking by Mr. Justice Waite, said:

"Every statute which takes away from the Legislature its power will always be construed most strongly in favor of the State. These are elementary principles. The question here is whether the legislature of Georgia conferred on the inferior courts of its several counties the power of contracting away the right of the State to es-

tablish such ferries and bridges in a particular locality as the ever-changing wants of the public should in the progress of time require. In our opinion it did not. It gave these courts the right to establish ferries or bridges, but not to tie the hands of the public in respect to its future necessities."

In Detroit, etc., Street Railway Co. v. Detroit, etc., Co., 171 U. S. 48, 43 L. Ed. 67, the Street Railway Company was by the city ordinance "exclusively authorized to construct and operate railways on certain streets of the City for a period of thirty years." The Act of the legislature under which the Street Railway Company was organized provided that all such companies "shall have the exclusive right to use and operate any railways constructed, owned or held by them." The City granted a franchise to another railway company. In considering the case the Court said:

"It is clear that the statute did not explicitly and directly confer the power on the municipality to grant an exclusive franchise to occupy its streets for railway purposes." * * * * "That such power must be given in language explicit and express, or necessarily to be implied from other powers, is now firmly fixed. There were many reasons which urged to this—reasons which flow from the nature of the municipal trust—even from the nature of the legislative trust, and those which, without the clearest intention explicitly declared, insistently forbid that the future should be committed and

bound by the conditions of the present time and functions delegated for public purposes be paralyzed in their exercise by the existence of exclusive privileges."

The Court declares the principle underlying its decision as follows:

"A municipality is a governmental agency—its functions are for the public good, and the powers given to it and to be exercised by it must be construed with reference to that good and to the distinctions which are recognized as important in the administration of public affairs.

"Easements in the public streets for a limited time are different and have different consequences from those given in perpetuity. Those reserved from monopoly are different and have different consequences from those fixed in monopoly. Consequently those given in perpetuity and in monopoly must have for their authority explicit permission, or, if inferred from other powers, it is not enough that the authority is convenient to them, but it must be indispensable to them."

For other cases expressing the same doctrine, see Illinois Trust & Savings Bank v. Arkansas City, 76 Fed. 271.

Jackson Co. R. Co. v. Interstate, etc. Co., 24 Fed. 306.

Saginaw Gas Co. v. Saginaw, 28 Fed. 529.

Grand Rapids, etc., Co. v. Grand Rapids, 33 Fed. 659.

In re Brooklyn, 143 N. Y. 596.

Long Island Water Co. v. Brooklyn, 166 U. S. 685, 41 L. Ed. 1165.

It is equally well settled that in grants of exclusive franchises by municipal corporations nothing passes by implication. The grant is to be construed more strongly in favor of the public and against the grantee.

In Knoxville Water Co. v. Knoxville, No. 123, decided by this Court January 2nd, 1906, the Court discusses former cases and declares it to be clearly settled that in cases of such grants nothing passes by implication or presumption.

In Joplin v. Southwest Missouri Light Co., 191 U. S. 150, 48 L. Ed. 127, it appeared that the City was authorized to construct and operate electric light plants or waterworks of its own, or it might grant such right to any person or corporation upon such terms as might be prescribed by the ordinance. The City of Joplin granted this right to a private corporation. Subsequently the City provided for the construction of its own system. The Circuit Court held that the City could not thus enter into competition with its grantee and so to destroy or greatly impair the value of the franchise. This court reversed the Court below saying that the limitation con-

tended for was upon a governmental agency and that restraints upon that must not be readily implied, and that such a limitation would give the light company a practical monopoly for that "others may not seek to compete with it, and if the city cannot, the city is left with a useless potentiality while the appellee exercises and enjoys practically exclusive right."

Not only was the City of Columbus without any color of authority for granting an exclusive franchise which would tie the hands of the city in the future with respect to the interests of the public, but the legislature itself was forbidden to make such a grant.

The Constitution of Georgia, Article I, Section 2, Paragraph 2, Code Sec. 5730, declares as follows:

> "No bill of attainder, ex post facto law, retroactive law, or law impairing the obligation of contracts or making irrevocable grants of special privileges or immunities shall be passed."

The Constitution of Alabama uses identically the same language with respect to such grants. Section 1 of Article 23 of that Constitution is as follows:

> "That no ex post facto law, or any law impairing the obligations of contracts or making any irrevocable grants of special privileges or immunities shall be passed by the General Assembly."

This section of that Constitution has been construed and applied by the Supreme Court of Alabama in the case of Birmingham & P. Min. Ry. Co. v. Birmingham Street Railway Co., 79 Ala. 465, 58 Amer. Rep. 615. The City of Birmingham had given what was in general terms an exclusive right to the plaintiff to construct a street railway along certain streets, and afterwards had given to the defendant the right to occupy the same streets with the street railway. Considering the first grant by the City the Court said:

> "What, it may be asked, is the nature of these special or exclusive privileges, which are thus prohibited to be granted by the legislature? It seems plain from the very terms used that the evil intended to be specially prevented was the granting of exclusive privileges in the nature of a monopoly by the legislative creation of corporate franchises. Monopolies were void at the common law, and are not commonly conferred by legislative grant, and need no special prohibition in the organic law of a free republic. . . . The policy of the law, as now declared by our Constitution, is as clear in the condemnation of the grant of irrevocable exclusive privileges conferred by franchise, as that of the common law was in the reprobation of pure monopolies which were always deemed odious, not only as being in contravention of common right, but as founded in the destruction of trade by the extinguishment of a free and healthy competition. Case of the Monopolies, 11 Coke, 84b. The exclusive

> right of the appellee to the privilege claimed, in our opinion, can not be sustained. The General Assembly would itself have no power under the Constitution to make such a grant."

This case was quoted from and cited with approval by this Court in Bienville Water Supply Co. v. Mobile, 186 U. S. 212, 46 L. Ed. 1132.

The City did not expressly contract that it would not build waterworks of its own as in the Walla Walla case. The language of the contract in question is "that the Mayor and Council are to grant the franchise for an exclusive privilege," etc. Unless the privilege is exclusive the City can not be said to have contracted not to invade that privilege; if it is exclusive it is forbidden by the Constitution and laws of the State of Georgia.

Had the City been vested with authority from the legislature to grant an exclusive privilege and had it in fact done so it would have been subject to the reserved right of revocation.

The case of Bienville Water Supply Co. v. Mobile, 186 U. S. 212, 46 L. Ed. 1132, is closely in point, if not indeed conclusive of the proposition.

The charter of the Water Company gave it the exclusive right of supplying water to the City and County of

Mobile for a term of twenty years, and until the purchase of the plant by the City, reserving, however, the right to permit the future organization of any company for the purpose of supplying the City with water which should not interfere with the property rights of the Bienville Company. The City contracted with the Bienville Company for water for a term which had not expired. Afterwards, but before the expiration of the contract term, the Legislature conferred upon the City the right to erect its own water system; and amended the charter of the Bienville Company by striking therefrom the word "exclusive," thus depriving the grant of its exclusive character. The City was proceeding to erect its own system, when the Water Company sought to enjoin it. The Court after stating that obviously the Alabama Constitution intended that the Legislature should have the right of revocation, and that whoever took a charter should take it subject to that right, declared that the exercise of the right was not limited to cases where no injustice would thereby be done to the corporators. Speaking by Mr. Justice Brewer, the Court said:

> "But the grant of a monopoly is forbidden by the Alabama Constitution. As said by its Supreme Court, in the quotation just made: 'The General Assembly would itself have no power under the Constitution to make such a grant.'
>
> "By a separate section of the Constitution it is affirmatively declared that the Legislature shall pass no act "making an irrevocable grant of special

privileges or immunities." While that body may grant special privileges and immunities, grant franchises to build waterworks, construct railways, or other works of public utility, and by failure to duplicate a grant make it in effect for the time being exclusive, yet no one Legislature can forestall action by a succeeding Legislature, or bind the State by making the grant in terms exclusive. As much force and effect must be given to Section 23 as to any other, and it was obviously the intent that, even if exclusive privileges were granted, the monopoly feature thereof should always be subject to revocation. In this section there is no suggestion of amendment or alteration. That which is distinctly provided is the absolute power of revocation. To hold that the exclusive feature of plaintiff's grant could not be revoked because thereby injustice might be done to the corporators is simply to nullify Section 23."

The right of the State to revoke grants to corporations is expressly recognized by the Supreme Court of Georgia in Macon & Birmingham R. Co. v. Gibson, 85 Ga. 1; and in response to the contention that the rights of third parties would be affected the Court said that all parties contracting with a corporation must take notice of the conditions on which it holds its franchise and of its subjection to the legislative will.

A very similar constitutional provision of the State of Ohio has been passed upon by this Court in the case of Hamilton Gaslight & Coke Co. v. City of Hamilton, 146 U. S. 258, 36 L. Ed. 963.

A statute of the State of Ohio gave to cities the right to contract with gas companies for city lighting. The City of Hamilton, by ordinance, gave the gas company "the exclusive privilege of laying pipes for carrying gas in said city and of putting up pipes in dwellings in connection with the street pipes for the term of twenty years." Subsequently the City passed a resolution declaring that it no longer desired the company to furnish gas for public lighting, and notifying the company to remove its mains and posts from the streets. The City passed an ordinance looking to the issuing—such issuing being first approved by the popular vote—of bonds for the purpose of itself erecting works to supply the City and its inhabitants with gas. It also appeared that the City was authorized by the Legislature to erect works of its own. Suit was thereupon instituted by the gas company against the City to enjoin it from issuing bonds and from erecting gas works of its own.

The Court said:

> "It may be that the stockholders of the plaintiff supposed at the time it became incorporated, and when they made their original investment, that the City would never do what evidently is contemplated by the ordinance of 1889. And it may be that the erection and maintenance of gas works by the City at the public expense, and in competition with the plaintiff, will ultimately impair, if not destroy, the value of the plaintiff's works for the purpose for which they were established. But such

> consideration can not control the determination of the legal rights of the parties. As said by this Court in Curtis v. Whitney, 13 Wall. 68, 70: 'Nor does every statute which affects the value of a contract impair its obligation. It is one of the contingencies to which the parties look now in making a large class of contracts, that they may be affected in many ways by State and national legislation.' If parties wish to guard against contingencies of that kind they must do so by such clear and explicit language as will take their contracts out of the established rule that public grants, susceptible of two constructions, must receive the one most favorable to the public."

The Constitution of Ohio contains a clause, similar to that in force in this State, which provided that "no special privileges or immunities shall ever be granted that may not be altered, revoked or repealed by the General Assembly."

Discussing the effect of this clause on a franchise, exclusive by its terms, the Court said:

> "If the statute under which the plaintiff became incorporated be construed as giving it the exclusive privilege, so long as it met the requirements of the law, of supplying gaslight to the City of Hamilton and its inhabitants by means of pipes laid in the public ways, there is no escape from the

conclusion that such a grant as respects, at least, its exclusive character, was subject to the power of the Legislature, reserved by the State Constitution, of altering or revoking it. This reservation of power to alter or revoke a grant of special privileges, necessarily became a part of the charter of every corporation formed under the general statute providing for the formation of corporations. A legislative grant to a corporation of special privileges, if not forbidden by the Constitution, may be a contract, but where one of the conditions of the grant is that the Legislature may alter or revoke it, a law altering or revoking, or which has the effect to alter or revoke, the exclusive character of such privileges, can not be regarded as one impairing the obligation of the contract, whatever may be the motive of the Legislature, or however harshly such legislation may operate, in the particular case, upon the corporation or parties affected by it."

There is nothing in the case of Walla Walla v. Walla Walla Water Company, 172 U. S. 1, 43 L. Ed. 341, that conflicts with or qualifies the proposition that the City can not, in the absence of express authority, grant an exclusive privilege or franchise. In the opinion it is said that a grant of a right to a water company to use the streets of the city is a franchise granted on consideration of a public service, and after performance by the grantee is a contract protected by the Constitution of the United State *"provided the right to do so is given by their charter."* The City of Walla Walla was expressly authorized to grant the franchise for the term

In the Walla Walla case no constitutional provision was involved nor had the Courts of the State construed the clause in the charter of the City relating to the incurring of indebtedness. The contrary is true of the case at bar and brings it within the general rule that this Court will accept as binding the construction given by the highest Court of the State to its own Constitution and Statutes.

V.

It plainly appears from the facts of the case at bar that in providing for the construction of a municipal water system the City was proceeding in the exercise of its police power. Against the exercise of this power the City could not bind itself by contract.

This Court says in Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 43 L. Ed. 341, 347:

> "If a contract be objectionable in itself upon these grounds, or if it become so in its execution, the municipality may, in the exercise of its police power, regulate the manner in which it may be carried out, or may abrogate it entirely, upon the principle that it can not bind itself to any course of action which may prove deleterious to the health or morals of its inhabitants. In such case an appeal to the contract clause of the Constitution is ineffectual."

Mr. Justice Bradley, speaking for the Court in Boston

Beer Co. v. Massachusetts, 97 U. S. 28, 24 L. Ed. 989, says:

> "Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens and to the preservation of good order and the public morals. The Legislature can not, by any contract, devest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim "salus populi suprema lex," and they are to be attained and provided for by such appropriate means as the Legislature legislative discretion may devise. That discretion can no more be bargained away than the power itself."

In Butchers Union Co. v. Crescent City Co., 111 U. S. 746, 28 L. Ed. 585, the Legislature of Louisiana had granted the Crescent City Company an exclusive right to slaughter cattle in the City of New Orleans; that this right was exclusive had been determined in the Slaughter House cases, 16 Wall. 86, 21 L. Ed. 394, and it was further held that the State had the constitutional right to grant the exclusive franchise creating the monopoly.

In the Butchers Union case it was said that the Crescent City Company had expended a very large amount of money on the faith of the privilege and that the transaction presented all the elements of a contract on suffi-

cient consideration; and it further said that an ordinance of the City of New Orleans granting the right to slaughter cattle to others impaired the supposed obligation of the contract by taking away the exclusive right of the company granted to it for twenty-five years, which constituted the most valuable thing supposed to be secured by statutory contract. The Court held that the ordinance was a proper exercise of that well-known but undefined power called the police power so indispensable to the public welfare that it can not be bargained away by contract.

The Court, speaking through Mr. Justice Miller, forcibly declares:

> "While we are not prepared to say that the Legislature can make valid contracts on no subject embraced in the largest definition of the police power, we think that, in regard to the subject so embraced, it can not by any contract, limit the exercise of those powers to the prejudice of the general welfare. These are the public health and public morals. The preservation of these is so necessary to the best interests of social organization that a wise policy forbids the legislative body to devest itself of the power to enact laws for the preservation of health and the repression of crime."

Upon this branch of the case we submit that even if it should be considered for the sake of argument that

the Act of the General Assembly of Georgia authorized the City of Columbus to proceed in derogation of an exclusive privilege granted in the contract with the Waterworks Company, it is so plainly apparent that the City was without power to make such a contract that no federal question can be said to be involved; and further that even if the City had the power to grant an exclusive franchise the reserved right of the State was sufficient to authorize its revocation whenever in the opinion of the City the public interest so required.

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October 22, 1906.